Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: N. A. v Minister of Employment and Social Development, 2019 SST 329

Tribunal File Number: AD-18-659

BETWEEN:

N. A.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: April 4, 2019

Canada

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

OVERVIEW

[2] The Appellant, N. A., was born in Syria and came to Canada as a teenager. She attended school up to Grade 9 and is now 53 years old. She was last employed as a grocery store produce clerk in July 2011 and has not worked since then.

[3] In November 2015, the Appellant applied for a disability pension under the *Canada Pension Plan*, claiming that she could no longer work because of numerous medical conditions, among them depression, chronic pain disorder, migraine headaches, carpal tunnel syndrome, diabetes, and the effects of a transient ischemic attack. The Respondent, the Minister of Employment and Social Development (Minister), refused the application after determining that her disability was not "severe and prolonged" as of the minimum qualifying period (MQP), which ended on December 31, 2012.

[4] The Appellant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by videoconference and, in a decision dated June 27, 2018, dismissed the appeal, finding that the Appellant had failed to demonstrate that she was "incapable regularly of pursuing any substantially gainful occupation" as of the MQP. In particular, the General Division found that the Appellant had not fully explored her treatment options nor made reasonable attempts to seek alternative employment.

[5] On October 5, 2018, the Appellant's legal counsel requested leave to appeal from the Tribunal's Appeal Division, alleging various factual and legal errors on the part of the General Division. In particular, the Appellant alleged that the General Division:

- disregarded the cumulative effect of her medical conditions, contrary to *Bungay v Canada*;[1]
- failed to apply the real world test, as required by *Villani v Canada*;[2]
- gave insufficient weight to medical evidence from Dr. Kassam because he did not see her until after the MQP;
- found that she had work capacity despite Dr. Jamani's medical evidence to the contrary;
- erred when it found that her fibromyalgia and diabetes were not diagnosed until after the MQP;
- considered her mental health issues solely through the lens of Dr. Slataroff's psychiatric report;
- disregarded her testimony, specifically her explanations for why she did not follow Dr. Slataroff's treatment recommendations; and
- erred when it found that she had not attempted to work after the MQP.

[6] In my decision dated October 26, 2018, I allowed leave to appeal because I saw a reasonable chance of success for at least three of the Appellant's reasons for appealing.

[7] In written submissions dated December 10, 2018, the Minister denied that the General Division committed any errors and asked that the appeal be dismissed.

[8] I have reviewed the parties' oral and written submissions and concluded that the General Division erred in law by misinterpreting the *Villani* real world test. I am satisfied that the record is sufficiently complete to allow me to give the decision that the General Division should have given and find the Appellant disabled.

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[1] *Bungay v Canada (Attorney General)*, 2011 FCA 47.
[2] *Villani v Canada (Attorney General)*, [2002] 1 FC 130, 2001 FCA 248.

ISSUES

[9] According to section 58(1) of the *Department of Employment and Social Development Act* (DESDA), the only grounds of appeal to the Appeal Division are the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
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> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
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> (c) The General Division based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it.

[10] Having considered all issues raised by the Appellant, I am satisfied that the General Division committed at least one error—misinterpreting *Villani*—in arriving at its decision. Since the appeal succeeds for this reason alone, I see no need to consider any of the other potential grounds of appeal.

ANALYSIS

How much deference should the Appeal Division extend to the General Division?

[11] In *Canada v Huruglica*,[3] the Federal Court of Appeal held that administrative tribunals must look first to their home statutes for guidance when determining their role: "The textual, contextual and purposive approach mandated by modern statutory interpretation principles provides us with all the necessary tools to determine the legislative intent."

[12] Applying this approach to the DESDA, one notes that sections 58(1)(a) and (b) do not define what constitutes errors of law or breaches of natural justice, which suggests that the Appeal Division should hold the General Division to a strict standard on matters of legal interpretation. In contrast, the wording of section 58(1)(c) suggests that the General Division is to be afforded a measure of deference on its factual findings. The decision must be **based** on the allegedly erroneous finding, which itself must be made in a "perverse or capricious manner" or

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[3] *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93.

"without regard for the material before [the General Division]." As suggested by *Huruglica*, those words must be given their own interpretation, but the language suggests that the Appeal Division should intervene when the General Division commits a material factual error that is not merely unreasonable, but clearly egregious or at odds with the record.

Did the General Division misinterpret the *Villani* real world test?

[13] The Appellant suggests that the General Division misapplied *Villani*, which requires disability to be considered in a real world context, taking into account a claimant's employability, given their age, work experience, level of education, and language proficiency. The Appellant specifically alleges that the General Division erred when it found that her disability fell short of severe, despite evidence that she cannot realistically work in a sedentary position.

[14] I agree that the General Division erred in law. In its decision, the General Division cited *Villani*, but, as the Appellant rightly notes, it is not enough to merely quote a prepackaged ratio; decision-makers must also show that they understand the relevant jurisprudence and can correctly apply it to the facts at hand. In its analysis, the General Division wrote:

> I must assess the severe part of the test in a real world context. This means that when deciding whether a person's disability is severe, I must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. The [Appellant] was 47 years of age at the time of her MQP of December 31, 2012. She has only a grade 9 education. Her work history consisted of working in physically demanding jobs. **I am of the view that she did not develop transferable skills from her work experience.** Keeping in mind the [Appellant's] personal circumstance, along with her medical condition, I have concluded that her personal circumstances, which eventually led to her physical and psychological conditions, would negatively impact on her ability to seek, and, if necessary, retrain for part-time employment. **However, it must be noted that the main indicator of a [Appellant's] entitlement to [Canada Pension Plan (CPP)] disability benefits, is her medical condition.** I have found that her physical and psychological conditions would not have prevented her from seeking and maintaining suitable gainful employment on or before December 31, 2012 [emphasis added].

[15] I see several problems with this passage. First, the General Division neglects to address the Appellant's English-language proficiency, here or anywhere else in the decision, yet that is one of the factors that *Villani* explicitly urges decision-makers to take into account. The Appellant is not a native English speaker and, while she has succeeded in low-level customer service jobs in the past, it is unclear whether her skills are good enough for the types of sedentary jobs to which she might now be physically suited. Yet the General Division did not assess her capacity to retrain or pursue alternative employment in the context of her ability to communicate in the dominant language of work in her province.

[16] Second, there appears to be a logical contradiction in the above passage, in that its conclusion does not flow from established premises. The General Division accepts that the Appellant does not have transferrable skills. It also agrees that her condition would "negatively impact" her ability to retrain for part-time employment. However, the General Division does not explain how, if the Appellant has no skills and has limited capacity to acquire skills, she could be reasonably expected to reintegrate herself in the labour market, given her impairments.

[17] Third, I find it significant that the General Division believes a claimant's medical condition to be the **main** indicator of CPP entitlement. *Villani* makes it clear that a claimant's medical conditions and his or her personal characteristics are inextricably linked and cannot be considered in isolation from each other:

> Each word in the subparagraph must be given meaning and when read in that way the subparagraph indicates, in my opinion, that Parliament viewed as severe any disability which renders an Appellant incapable of pursuing with consistent frequency any truly remunerative occupation. In my view, […] occupations which a decision-maker must consider **cannot be divorced** from the particular circumstances of the Appellant, such as age, education level, language proficiency and past work and life experience [emphasis added].[4]

The Federal Court of Appeal elaborated on this principle in *Bungay*, which held that the employability of disability claimant is not to be assessed in the abstract, but rather in light of "all of the circumstances."[5] Those circumstances are not confined to the claimant's medical condition

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[4] *Villani*, para 38.
[5] *Bungay*,

(which itself must be assessed in totality) and must include the background factors identified by *Villani*. A final sign that the General Division took an unbalanced approach in assessing severity can be seem in the structure and content of its analysis, whose eight pages, save for one paragraph, were devoted almost exclusively to a discussion of the Appellant's medical issues.

[18] I can also see how this error of law may have tainted at least one of the General Division's other findings. The General Division based its decision, in part, on what it found was the Appellant's lack of effort to retrain or look for other types of work;[6] however, the duty to pursue alternative employment applies only if the claimant is first found to have residual capacity.[7] It is impossible to properly assess residual capacity if the *Villani* principles have been ignored or misconstrued. Here, it appears that the General Division did just that. To be sure, a decision-maker is permitted to draw an adverse inference from a claimant's failure to seek work, but only if it first finds that the claimant has residual capacity. However, a claimant's failure to seek work cannot by itself be used to make a finding that their disability is severe.

[19] I am satisfied that, in analyzing the severity of her impairments, the General Division neglected to fully consider the Appellant's personal characteristics and, in doing so, displayed a misapprehension of one of *Villani*'s key principles.

REMEDY

Is the record complete?

[20] The DESDA sets out the Appeal Division's powers to remedy errors by the General Division. Under section 59(1), I may give the decision that the General Division should have given; refer the matter back to the General Division for reconsideration in accordance with directions; or confirm, rescind, or vary the General Division's decision. Furthermore, under section 64 of the DESDA, the Appeal Division may decide any question of law or fact that is necessary for the disposition of any application made under the DESDA.

[21] In oral submissions, both parties agreed that, if I found errors in the General Division's decision, the appropriate remedy would be to give the decision the General Division should have

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[6] General Division decision, para 29.
[7] *Inclima v Canada (Attorney General)*, 2003 FCA 117.

given. Of course, the parties disagreed about what that decision should be, with the Appellant arguing that the available evidence proved disability and the Minister arguing the opposite.

[22] The Federal Court of Appeal has stated that a decision-maker should consider the delay in bringing a disability claim to conclusion. The Appellant applied for a disability pension more than three years ago. If I referred this matter back to the General Division, it would lead only to further delay. In addition, the Tribunal is required to conduct proceedings as quickly as the circumstances and the considerations of fairness and natural justice allow. I doubt that the evidence would be materially different if the General Division were to rehear the matter.

[23] I am satisfied that the record before me is complete. The Appellant has had ample opportunity to submit medical evidence, and there is considerable information about her employment history on file. The General Division conducted a full oral hearing and heard the Appellant's testimony about her impairments, their progression, and when they started to affect her ability to work. The hearing was recorded, and I have listened to all of the recording.

[24] As a result, I am in a position to assess the evidence that was on the record before the General Division and to give the decision that it would have given, had it not erred. In my view, if the General Division had interpreted *Villani* correctly, then it would have come to a different conclusion. My own assessment of the record satisfies me that the Appellant had a severe and prolonged disability as of December 31, 2012.

Does the Appellant have a severe disability?

[25] To be found disabled, a claimant must prove, on a balance of probabilities, that they had a severe and prolonged disability at or before the end of the MQP. A disability is severe if a person is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is "likely to be long continued and of indefinite duration or is likely to result in death."[8]

[8] CPP, s. 42(2)(a)(ii).

[26] The Appellant has a history of anxiety, depression, and widespread pain, among other conditions. The question is whether her many medical problems amounted to a severe disability as of December 31, 2012. This is what I see documented in the file before that date:

- The Appellant complained to Dr. Jamani, her family doctor at the time, that she had pain in her hands, neck, right knee, and lower back radiating down to her left foot.[9]
- For the most part, various imaging reports showed only mild degenerative changes before the MQP. However, the Appellant was later diagnosed with bilateral carpal tunnel syndrome, and she underwent a surgical release on the left side in July 2012[10]
- In March 2010, the Appellant was admitted to hospital with symptoms (left-sided numbness) suggestive of a stroke. Testing revealed no abnormalities, and she was deemed to have a conversion disorder (in which physical symptoms are triggered by psychological factors).[11]
- The Appellant told Dr. Jamani that she was unable to work, in part, because she was depressed. Dr. Jamani referred her to a mental health counsellor, Donna Tweedell, who noted that the Appellant had displayed "impulsive suicidal behaviour."[12]

[27] Appellant changed family doctors after Dr. Jamani retired in 2014. From what I can gather, Dr. Rassam managed the Appellant's care more aggressively than had Dr. Jamani, referring her to a psychiatrist and diagnosing her with major depression, chronic pain, and fibromyalgia.[13] The symptoms that led to diagnoses of depression and chronic pain in under Dr. Rassam in 2015 were essentially the same symptoms that she had reported three years earlier to Dr. Jamani. It is reasonable to assume that these chronic conditions, which tend to arise gradually, originated during the MQP.

[28] The Appellant worked in the produce department of a grocery store for 11 years. The job required her to be on her feet at all times and to lift moderately heavy loads. I am satisfied that the Appellant was no longer able to perform physical work at the end of the MQP, but was there

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[9] Dr. S.K. Jamani's clinical; notes, June 9, 2010 to July 24, 2014, GD2-7 to GD2-16
[10] Operative report dated July 5, 2012 by Dr. Allan Campbell-Moscrop, plastic surgeon, GD2-55.
[11] Discharge summary dated March 10, 2010 by Dr. A. Chakroborty, GD2-262.
[12] Letter dated April 12, 2012 by Donna Tweedel (reproduced in Dr. Jamani's clinical notes), GD2-11.
[13] CPP medical Report dated December 2, 2015, GD2-175.

realistically anything else within her capabilities at the time? In my view, no, given her background and personal profile. The Appellant has limited education and was 47 years old at the end of the MQP. She has spent her entire working life in retail settings and, as the General Division noted, she has acquired little in the way of transferrable skills. She came to Canada when she was 18 and, while she is fluent in conversational English, her reading and writing skills in this language are likely weak.[14] The Appellant's physical problems are compounded by her fragile psychological condition. Although the Minister has argued that she would be capable of performing alternative occupations, I find it unlikely that she would be able to retrain for a sedentary position or to otherwise secure and maintain substantially gainful employment as, for instance, an office worker.

[29] Unlike the General Division, I find that the Appellant took reasonable steps to remain in the labour market. After the onset of carpal tunnel syndrome, she took extended leave from her job as a produce clerk, but eventually returned to work in January 2011. She lasted only six months, overwhelmed by rising pain and anxiety. I also find that the Appellant mitigated her impairments by following medical advice. Over the years, she has seen numerous a number of specialists, among them two internists, two pain management consultants, and a psychiatrist. She has shown a willingness to undergo surgery where recommended and has tried a wide variety of pain medications and antidepressants. It is true that the Appellant did not purchase workbooks, as Dr. Slataroff recommended in 2015,[15] but this strikes me as a minor lapse for which, in any case, the Appellant had plausible excuses—her limited English reading skills and, more importantly, her reluctance to revisit traumatic events in her childhood.

[30] The Appellant's testimony before the General Division conveyed forthrightness, and her description of her symptoms and their effect on her ability to function in a workplace were credible. I also gave weight to the Appellant's lengthy work history, which included a lengthy tenure for a single employer for modest wages. One can reasonably surmise that an individual with this demonstrated work ethic would not have left the labour market unless there was some significant underlying cause.

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[14] At the 1:02 mark of the recording of the General Division hearing, the Appellant testified that it was a "little bit hard" for her to read in English.
[15] Letter dated December 17, 2015 by Dr. Y. Slataroff, psychiatrist, GD5-50.

Does the Appellant have a prolonged disability?

[31] The Appellant's testimony, corroborated by the medical reports, indicates that she has suffered from widespread pain and depression for many years. Treatment has had only a limited effect, and the Appellant has become effectively unemployable. It is difficult to see how her health will significantly improve, even with further treatment. In my view, these factors qualify the Appellant's disability as prolonged.

CONCLUSION

[32] I am allowing this appeal. Having decided that the General Division based its decision on an erroneous interpretation of *Villani*, I found that there was sufficient evidence on the record to permit me to give the decision that the General Division should have given. The Appellant has satisfied me that she has a disability that became severe and prolonged in July 2011, her last month at work. Under section 42(2)(b) of the CPP, a person cannot be deemed disabled more than 15 months before the Minister received the application for a disability pension. In this case, the application was received in November 2015; therefore, the Appellant is deemed disabled as of August 2014. According to section 69 of the CPP, payments start four months after the deemed date of disability. The Appellant's disability pension therefore begins as of December 2014.

Member, Appeal Division

HEARD ON:	March 7, 2019
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	N. A., Appellant Deyaniru Benavides, Representative for the Appellant Viola Herbert, Representative for the Respondent